Supreme Court, U.S.
FILED
DEC 19 2001
CLERK

(3)

No. 01-594

IN THE

Supreme Court of the United States

DEAD SEA BROMINE CO., LTD. and BROMINE COMPOUNDS LIMITED,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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16 pp

CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at pages *ii-iii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Dead Sea Bromine Company Ltd. ("Dead Sea Bromine") and Bromine Compounds Limited (collectively, the "Dead Sea Companies" or the "Companies") submit this reply to the Brief in Opposition to Petition for a Writ of Certiorari ("Opposition Brief") of the respondents, Geraldo Dennis Patrickson, et al. (the "Respondents"), who proffer four reasons why certiorari should not be granted. None can withstand analysis.

1. The Existence of a Circuit Split Was Clearly Established By The Ninth Circuit's Decision Below, After This Court's Denial of Certiorari in *Delgado*.

Respondents contend that since the date of this Court's denial of certiorari in *Delgado v. Shell Oil Co., et al.*, 231 F.3d 165 (5th Cir. 2000), *cert. denied*, No. 00-1316, 121 S. Ct. 1603 (2001) ("*Delgado*"), "[n]othing has changed . . . to warrant this Court's review of the FSIA question." Opposition Brief at 8. They additionally assert that the Dead Sea Companies' arguments against certiorari in *Delgado* contradict the Companies' position in this case. *Id.* at 8-9. They are wrong on both counts. It was the Ninth Circuit's decision in this case that clearly framed the conflict among the circuit courts, and that decision was handed down after this Court denied certiorari in *Delgado*.

The question on which certiorari was sought in *Delgado* was the same as the question here at issue. In that case, the Dead Sea Companies had been held by the Fifth Circuit to be agencies or instrumentalities of Israel under the Foreign Sovereign Immunities Act ("FSIA" or the "Act") by virtue of Israel's ownership of a majority interest in the Companies through a tiered corporate structure. The *Delgado* plaintiffs argued that certiorari was appropriate because of an alleged split of authority between the Fifth Circuit's decision and the decision of the Ninth Circuit in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir.), *cert. denied* 516 U.S. 869 (1995) ("*Gates*").

The Dead Sea Companies opposed certiorari in *Delgado* on the ground that it was premature to conclude that a circuit split existed. The Companies argued that the Ninth Circuit's decision in *Gates* was distinguishable from *Delgado*. Moreover, they pointed out that the very issue was then pending before the Ninth Circuit in the appeal in this case and urged that in the absence of a ruling on the appeal, which would necessarily require an interpretation of *Gates*, it was not clear whether there was any circuit split to be resolved. *Delgado v. Shell Oil Co.*, No. 00-1316, Brief In Opposition for Respondents Dead Sea Bromine Company Ltd., et al. at 4-5, 7-12.

After this Court's denial of certiorari in *Delgado*, the Ninth Circuit issued its ruling in this case. The court rejected the Companies' effort to distinguish *Gates*, definitively interpreted the holding of that case as it applies to the State of Israel's indirect ownership of a majority interest in the Dead Sea Companies, and explicitly articulated the Ninth Circuit's disagreement with the conclusions of both the Fifth and Seventh Circuits in *Delgado* and *In re Air Crash Disaster Near Roselawn, Ind.*, 96 F.3d 932 (7th Cir. 1996) ("*Air Crash*"). A.22-24.

What has changed since the Dead Sea Companies opposed certiorari in *Delgado* is that, with the ruling below, the Ninth Circuit has now rejected the Companies' contention that *Gates* is distinguishable and clearly enunciated a direct and explicit conflict between its interpretation of the statutory language at issue and that of at least two other circuit courts of appeal.[1] The Dead Sea Companies' position before this Court in *Delgado* and in this case are entirely consistent. The issue was unripe for

1. The Ninth Circuit also alluded to a conflict on the point with the decision of the Sixth Circuit in *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 448-50 (6th Cir. 1988). As demonstrated in the Companies' Petition for a Writ of Certiorari ("Dead Sea Companies' Petition") and *infra*, the holding of the court below is inconsistent with the results reflected in more than a dozen other circuit court decisions, as well.

this Court's review on the petition for certiorari in *Delgado* because it was unclear at that time whether, in fact, any conflict among the circuits existed. In the wake of the ruling of the Ninth Circuit below, the existence of a conflict could not be more stark.[2]

2. There Is No Benefit To Be Gained From Allowing The Issue to Percolate Further In The Lower Courts.

The Dead Sea Companies and the defendants in this litigation have amply demonstrated in their respective Petitions for Certiorari[3] that the question at issue is one that arises frequently, has been examined by several circuit courts and numerous district courts, and has been resolved differently, on differing rationales. The issue has arisen or been presented by the facts in no fewer than forty cases. *See* Dead Sea Companies' Petition at 12-16. When inconsistent Ninth Circuit precedent is included in the count, some fifteen Circuit Court decisions have, contrary to the decision below, accepted tiered ownership as sufficient to create agency or instrumentality status under the statute. *See id.* There are now at least twelve district court decisions

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2. Respondents' argument is built on an exercise in false logic. They contend that, in opposing certiorari in *Delgado*, the Dead Sea Companies argued there was no conflict between *Gates* and *Delgado*; that in its decision below the Ninth said it was just following *Gates*; and, therefore, that the Dead Sea Companies cannot now contend there is a conflict between *Gates* and *Delgado*. Quite obviously, however, the argument that there was no conflict between *Gates* and *Delgado* rested on an interpretation of *Gates* that was urged upon the Ninth Circuit on the appeal below but definitively rejected in the decision in this case.

3. In *Dole Food Co. et al. v. Gerardo Dennis Patrickson, et al.*, No. 01-593, the defendants have filed an independent petition for certiorari in this case on the FSIA status of the Dead Sea Companies, who are third-party defendants in the case.

that have examined the permissibility of tiering under the Act. *See* Dead Sea Companies' Petition at 12-14; *Musopole v. South African Airways*, 2001 WL 1329196 (S.D.N.Y. Oct. 29, 2001); *Delgado*, 890 F. Supp. 1315, 1318 n.5 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165. Although a majority permit it, at least five, inspired largely by the reasoning expressed in the *Gates* decision, have concluded that tiering is prohibited. *See* Dead Sea Companies' Petition at 16.

Despite this array of conflicting precedents, respondents assert "that the matter would benefit enormously from further percolation." Opposition Brief at 11. They point to the fact that district courts in three circuits "have reached different conclusions" and that the "majority of the cases addressing the FSIA question presented have been district court decisions rather than opinions by the courts of appeals." *Id.* However, the frequency with which the issue arises at the district court level and the absence of a consensus between and within several circuits only highlight the need for this Court's review. There is no reason to believe that continuing judicial disarray on this important jurisdictional point will serve to clarify the law or point the way to an enlightened result, or that the issue will fade away. Indeed, that the confusion in existing caselaw concerns subject matter jurisdiction makes the need for resolution by this Court all the more compelling. *See, e.g., Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 202 (1988) (rules having jurisdictional consequences "should above all be clear"); *Kennedy v. Wright*, 851 F.2d 963, 967 (7th Cir. 1988) (citing numerous cases that "stress the importance of simple rules that conserve the time that courts and counsel must devote to jurisdictional questions, so that more time is available to deal with the merits"); *In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987) ("The more mechanical the application of a jurisdictional rule, the better. The chief and often the only virtue of a jurisdictional rule is clarity.") (citations omitted). The arguments for and against possible constructions of the

statute have been articulated, adopted and/or rejected, numerous times. The issues have also been discussed and vetted in scholarly journals and other legal writings. *See* Dead Sea Companies' Petition at 19 n.5. In the meantime, numerous entities that are indirectly majority owned by foreign sovereign states, whose interests, by any reckoning, are closely intertwined with the interests of those states, face uncertainty and inconsistent results concerning the fundamental issue whether the protections of the FSIA apply. A basic goal of this statute — uniformity among federal courts on issues and interests implicated by the FSIA — can be achieved at this point only by a ruling from this Court.

3. This Case Presents a Particularly Suitable Vehicle to Review the Ownership Issue.

It is difficult to imagine a case that could present a clearer or cleaner record to review the tiering issue than this case. The material facts concerning the State of Israel's ownership interest in the Dead Sea Companies are not complicated and the State's indirect majority interest in the Companies is undisputed.[4] The court below held that because the State did not directly own their shares of stock, the Companies are not instrumentalities of Israel and, accordingly, that it lacked jurisdiction over the action. A.22-24. On the basis of the same facts, the Fifth Circuit Court of Appeals has come to precisely the opposite conclusion, sustaining federal jurisdiction over several actions that are virtually identical to this case. *Delgado*, 231 F.3d at 176 (5th Cir. 2000).

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4. Until 1975, the State of Israel owned substantially all of Dead Sea Works Inc. ("Works"), which in turn owned substantially all of Dead Sea Bromine. In 1975 the State transferred its direct share ownership from Works to Israel Chemicals Ltd. ("ICL"), and for the next fifteen years ICL owned almost all of Works, and Works continued to own almost all of Dead Sea Bromine. In this same period, Bromine Compounds Limited was a subsidiary of Dead Sea Bromine. *See* Dead Sea Companies' Petition at 6-7.

As things now stand, the Dead Sea Companies, and numerous others which, like them, were or are owned and controlled by foreign sovereign states through one or more intervening corporate entities, are instrumentalities of a foreign state within the meaning of the FSIA if sued in the Fifth or Seventh Circuits, but are ordinary corporate parties in the Ninth Circuit. In the D.C., Second and Sixth Circuits, they have compelling arguments that they are within the scope of the FSIA, *see Gilson v. Republic of Ireland*, 682 F.2d 1022, 1026 (D.C. Cir. 1982), *on remand*, 606 F. Supp. 38 (D.D.C. 1984), *aff'd*, 787 F.2d 655 (D.C. Cir. 1986); *Reiss v. Societe Centrale du Groupe des Assurances Nationales*, 235 F.3d 738, 746 (2d Cir. 2000); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 448-50 (6th Cir. 1988); but, as in other circuits, they are ultimately subject to great uncertainty based on the divergence of case law at the district court level. Only a decision of this Court can resolve this uncertainty once and for all.

The case is all the more suitable for review in light of the nature and importance of the issue at stake. The FSIA is a significant enactment in which Congress addressed sensitive and unique issues that come into play when legal claims are asserted in courts of the United States against sovereign states and entities closely related to sovereign states. One of the main purposes of the Act was to make uniform the rules by which claims against such entities may be judicially resolved, and it did this, among other things, by establishing a broad right of access to federal court for the adjudication of all such claims. The lengthy list of cases cited in the briefs of all sides in this dispute that involve entities indirectly owned by foreign sovereigns substantiates that a large number of sovereign states have chosen to engage in a wide variety of enterprises through tiered corporate holdings.[5] Equally plainly, the rank confusion

5. That many if not all of these enterprises are commercial in nature was understood and anticipated by Congress, which provided that, although sovereign-related entities faced with legal claims as a (Cont'd)

that currently exists among the conflicting circuit and district court decisions seriously undermines the goals of uniformity and consistency that the Act was designed to achieve.

Respondents' contention that the case is unsuitable for review because of the existence — and rejection by the courts below — of certain other arguments is a canard. They argue, first, that the Companies are "not typical FSIA subsidiaries" because the State of Israel has divested itself of a majority ownership interest in the Companies before the complaint was filed. Opposition Brief at 12. There is nothing in the record of this case that in any way substantiates or even addresses the contention that the Companies' evolution away from majority state ownership in the 1990's makes them typical or atypical of similarly state-owned entities throughout the world. More importantly, however, as noted by the Ninth Circuit in the decision below, every court that has considered the issue has held that the FSIA applies to an entity that was an instrumentality of a foreign state at the time of the acts giving rise to the claim, even if the state did not continue to hold its majority ownership interest at the time of suit. A.19-20; *see* Dead Sea Companies' Petition at 8 n.3.[6] In the face of these significant and uniform precedents, there is no legal basis for the Respondents' assertion that, even if tiered ownership were generally permissible under the FSIA, the Dead Sea Companies would be outside the scope of the Act due to the State of Israel's recent divestiture of its majority holdings. Opposition Brief at 13. The fact

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(Cont'd)
result of such activities would often not enjoy immunity from liability, they would nevertheless be accorded broad access to a federal forum and protection from jury trials. *See* H.R. Rep. No. 94-1487 at 16; 28 U.S.C. §§ 1330(a), 1441(d), 1605(a).

6. *But cf. Ocasek v. Flintkote Co.*, 796 F. Supp. 362, 365 (N.D. Ill. 1992).

that this argument has been raised in this case has no bearing on the importance of the indirect ownership issue, or its ripeness for review and resolution by this Court.

Respondents' "fraudulent joinder" argument is based on a gross distortion. The issue Respondents attempt to inject into the analysis has nothing to do with the fraudulent joinder doctrine, which arises in the context of attempts to defeat federal jurisdiction, not to create it. *See, e.g.*, 15 Moore's Federal Practice § 102.21[5][a], at 102-55 (3d ed. 1998). Rather, Respondents point to the fact that their complaint in this case expressly disclaims any attempt to recover from the defendants for damages that may have been caused by the Dead Sea Companies' product and argue that the disclaimer vitiates the third-party claim asserted against the Companies. They go on to insinuate that, because the Companies are thus presented with a claim that is lacking in merit, it was somehow "fraudulent" for the Companies to invoke the jurisdiction of the federal courts as a forum to adjudicate the claim asserted against them.

As explained to the courts below, the Companies agree that the disclaimers in the plaintiffs' complaint undermine the third-party pleading that defendant Dole Food Company ("Dole") asserted against the Dead Sea Companies. That, of course, is a question of law,[7] which can and very possibly will be the subject of a motion to dismiss or for summary judgment at some appropriate future point in the litigation. Respondents can cite no authority, however, for the proposition that upon receipt of Dole's third-party complaint, the Companies were required to refrain from filing a notice of removal and, instead, litigate the

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7. It is anticipated that in response to such an argument, Dole would argue, as it did in the district court below, that the disclaimer in plaintiffs' complaint does not prevent Dole from seeking contribution from the Companies under the laws of the plaintiffs' home countries or under the law of Hawaii. *See* Defendants' Joint Memorandum In Opposition to Plaintiffs' Motion to Remand, dated March 19, 1998, at 22-26.

validity of the claim against them in state court. As agencies or instrumentalities of Israel, the Dead Sea Companies are entitled to litigate the validity of any claim asserted against them in a federal court, once preliminary issues of jurisdiction and venue have been resolved. This issue, too, has nothing at all to do with the suitability of this case to resolve the explicit circuit conflict over the indirect ownership issue that is squarely presented.[8]

4. The Ninth Circuit's Decision Was Incorrect.

The Dead Sea Companies have already summarized why the decision of the Ninth Circuit below was incorrect and should be reviewed by this Court. Dead Sea Companies' Petition at 20-23. Not surprisingly, Respondents argue that the decision below was correctly decided. Opposition Brief at 15-19. Whoever is right on this score, the argument for granting review is just as strong. The issue presented in this case is extremely important. It frames the scope and reach of the FSIA, a major Congressional enactment designed to address sensitive and complex issues of foreign relations that arise when claims are asserted against enterprises owned and controlled by foreign states; it is an issue that affects the legal status and protections that will or will not be afforded to such entities which, at the very least, have significant ties to foreign sovereign nations; it is an issue with obvious, demonstrated potential to recur; and it is an issue on which decisions of the lower courts are in disarray. If, as urged by Respondents, the court below correctly interpreted the statute, it is all the more reason to grant review and so declare, so the law can be correctly applied in the innumerable cases yet to come where the issue will be presented.

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8. Respondents make passing reference to a third argument, consistently raised by plaintiffs in these DBCP banana workers' cases, and consistently rejected by the courts, that Dead Sea has already settled the claim asserted against it by the defendants. *See* Brief in Opposition at 5. The assertion is without merit. *See, e.g., Delgado*, 231 F.3d at 182.

CONCLUSION

For all of the foregoing reasons, and the reasons set forth in the Dead Sea Companies' Petition, the Petition should be granted.

Respectfully submitted,

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